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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE  
Attorney General Opinion No. 12-IIB13  
December 21, 2012

VIA EMAIL AND REGULAR MAIL

Ms. Margaret McKay  
League of Women Voters of Delaware  
2400 W. 17<sup>th</sup> Street  
Clash Wing, Room 1, Lower Level  
Wilmington, DE 19806  
lwvde@voicenet.com

Re: FOIA Complaint Against Capital School District Board

Dear Ms. McKay:

We hereby respond to your petition to the Attorney General, initially received on August 10, 2012, and later supplemented and revised on November 7, 2012 (the “**Petition**”), for a written determination regarding the Board of Education (the “**Board**”) for the Capital School District (the “**District**”) and, specifically, the Board’s compliance with certain “open meeting” requirements set forth in Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10006 (“**FOIA**”).<sup>1</sup> Based on our review of the documents provided to us, we conclude that the Board violated FOIA’s open meeting laws and prescribe remediation as discussed below.

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<sup>1</sup> The Board is a “public body” within the meaning of FOIA. *See* 29 *Del. C.* § 10002(h). As such, the Board is subject to the “open meeting” requirements of FOIA. *See* 29 *Del. C.* § 10004.

## I. INTRODUCTION

The Petition challenges certain actions taken by the Board at or in connection with a public meeting held on May 16, 2012 (the “**May 16<sup>th</sup> Meeting**”). The Petition takes issue with the agenda for the May 16<sup>th</sup> Meeting and seeks to invalidate the Board’s vote to extend the District superintendent’s employment contract for an additional two years. The Petition also alleges that the minutes for the May 16<sup>th</sup> Meeting (the “**Minutes**”) do not reflect what transpired at the May 16<sup>th</sup> Meeting and were intentionally altered in an effort to make the Board’s vote look legitimate.

We see no issue with the agenda. We do, however, agree that the Board violated FOIA by frustrating, whether intentionally or not, the public’s right to observe and monitor the Board’s discussion of and vote on the proposal to extend the District superintendent’s employment contract. Due to the Board’s failure to communicate to attendees certain agreed-upon changes to the agenda and the manner in which the proposal would be handled at the May 16<sup>th</sup> Meeting, no members of the public were present for the Board’s discussion of and vote to approve the superintendent’s contract extension. We also agree that the Board violated FOIA because the Minutes do not reflect what actually happened at the May 16<sup>th</sup> Meeting with respect to the contract extension, though we are not convinced the minutes were doctored for an improper purpose.

We believe that the FOIA violations require remediation. We have determined that the vote to approve the contract extension was invalid and recommend that the Board reschedule the proposal for further discussion and vote at a subsequent public hearing. We also recommend that the Board revise the Minutes in accordance with the instructions provided below.

## II. BACKGROUND

### A. Notice and Agendas for the May 16th Meeting

On May 9, 2012, the Board timely filed a public announcement for the May 16th Meeting (the “**Announcement**”). The Announcement states:

The [Board] will convene for its regular monthly meeting on Wednesday, May 16, 2012 in the North Dover Elementary School auditorium. The [B]oard will convene into open session at 6:30 p.m. in the auditorium and entertain a motion to move into Executive Session for the purpose of discussing Personnel Matters . . . . The executive session shall take place in the North Dover Elementary School library. The Board will reconvene into public session in the auditorium . . . at approximately 7:30 p.m.

The Board also timely filed separate agendas for the executive and open sessions to be held at the May 16<sup>th</sup> Meeting. The executive session agenda (the “**ES Agenda**”) references a start time of 6:35 p.m. The ES Agenda does not reflect when the closed session was scheduled to end. The ES Agenda lists “Superintendent’s Contract” as the last item for discussion prior to “Adjournment.”

The agenda for the open session (the “**OS Agenda**,” and together with the ES Agenda, the “**Agendas**”) begins with and recites, verbatim, the above-cited paragraph from the Announcement. The OS Agenda indicates that the Board would convene in executive session in the library at 6:35 p.m. and reconvene in open session in the auditorium at 7:30 p.m. Section 3 of the OS Agenda lists a number of matters that were to be the subject of action and discussion during the open session, including Agenda Item 3.06 -- the “Superintendent’s Contract.” The last item on the OS Agenda, Agenda Item 5.01, is “Adjournment.” The OS Agenda does not reflect when the open session was scheduled to end.

**B. The May 16th Meeting**

According to the Minutes, the Board opened the May 16<sup>th</sup> Meeting and entered public session at 6:30 p.m., as scheduled. The Board then entertained and unanimously approved a motion to move into executive session. The Board entered closed session in the library at 6:31 p.m. According to the Board, its members discussed the contract extension and other matters during this executive session, but those discussions were still ongoing as the scheduled end-time for the executive session drew near. The Board maintains that, as a courtesy to the members of the public who appeared for the open session, the Board members tabled their discussions, adjourned the executive session and called the public meeting to order in the auditorium near the scheduled start time of 7:30 p.m.

After the Pledge of Allegiance, the Board performed a roll call (all members present) to establish a quorum and then entertained a motion to approve the OS Agenda, “as amended.” The Minutes for the open session reflect that the OS Agenda was unanimously approved and amended as follows: “[T]able Agenda Item No. 3.06 [Superintendent’s Contract] and at conclusion of regular meeting, [B]oard will return to closed session and reconvene to open session for action on Agenda Item 3.06 [Superintendent’s Contract].” The Minutes appear to be incorrect with respect to the purported “amendment” to the OS Agenda. All parties to this dispute are in agreement that the Board did not announce publicly or otherwise disclose to the attendees any changes to the manner in which the Board proposed to address the contract extension at the May 16<sup>th</sup> Meeting.

After approving the OS Agenda, as “amended,” the Board entertained several brief presentations and accepted public comment from the attendees. The Minutes reflect that only one public comment was made at the May 16<sup>th</sup> Meeting, which comment was unrelated to the

contract extension. The Board also addressed a number of “consent items” before turning to the items slated for action and/or discussion. Based on the Minutes, it appears that the Board addressed in open session all of the agenda items listed in Section 3 of the OS Agenda, other than Agenda Item 3.06, “Superintendent’s Contract.” The Board skipped over Agenda Item 3.06 without comment or explanation.

The first open session concluded at around 9:25 p.m., with members of the public still in attendance. According to the Board, at that time, the Board members made their way back to the library and reconvened in executive session to wrap up their discussions concerning the contract extension. The second executive session lasted until 9:50 p.m., at which time the Board returned to an empty auditorium. The Board nonetheless reconvened in open session to take action on the proposed contract extension.

At the inception of the second open session, one of the Board members made a motion to table the Board’s contract extension discussions until November 2012. According to the Minutes, the motion did not receive a second vote and therefore did not pass. A second Board member then made a motion to approve the proposal. After that motion was seconded, the Board voted 3 to 2 to approve a two-year extension of the District superintendent’s employment contract. The Minutes reflect that the Board adjourned the May 16<sup>th</sup> Meeting at 10:08 p.m.

### **C. The Petition and Related Correspondence**

On August 10, 2012, we received from you correspondence, including an email and a letter (together, the “**Correspondence**”), referencing an “attached” FOIA open meeting complaint against the Board based on alleged FOIA violations stemming from the May 16<sup>th</sup> Meeting. An initial draft of the Petition was enclosed with the Correspondence. The Correspondence reflects that you became aware of the violations only after reviewing the

Minutes, which were not approved until June 13, 2004. On November 7, 2012, at our request, you promptly supplemented and revised the Petition.

The Petition asserts three violations of FOIA's open meetings laws. Specifically, you assert that the Board:

- failed to reflect in the Agendas the Board's intention to enter into a second, unannounced, executive session to discuss the contract extension;
- failed to announce to the public that the Board planned to return to open session for a vote after a second closed session concerning the contract extension (the "**Plan**"); and
- falsified the Minutes to make it appear as though the Board informed the public of its Plan during the initial open session.

#### **D. The Board's Response to the Petition**

The Board first contends that your arguments are untimely to the extent you failed to lodge the Petition within 60 days of learning about the alleged FOIA violations.<sup>2</sup> The Board submits that the Petition lacks substance because:

- the Agendas satisfy the pertinent statutory provisions, FOIA §§ 10002(a) and 10004(e)(2); and
- the Board's failure to disclose the Plan did not intentionally mislead or prejudice the public because the contract extension was listed on the OS Agenda as an action item.

The Board did not expressly address the argument that the Minutes were falsified, though we assume the Board members refute those allegations.

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<sup>2</sup> The Petition was first submitted on August 10, 2012, which is less than 60 days from the date on which you allege that you first became aware of the issues with respect to the May 16<sup>th</sup> Meeting. Due to an apparent oversight by this Office, the August 10, 2012 version of the Petition was not communicated to the Board. The Petition was timely filed and will be addressed on its merits.

### **III. DISCUSSION**

The Board violated FOIA in two respects. First, while the Agendas contained sufficient information for the public to decide whether to attend the May 16<sup>th</sup> Meeting, we conclude that the Board's subsequent failure to announce the Plan at any point during the initial open session caused attendees to believe that the contract extension would be taken up at a subsequent meeting. The Board's omission frustrated the public's right to observe and monitor the Board's performance and decisions with respect to the proposed contract extension. Second, we do not believe that the Minutes contain an accurate record of the votes taken and actions agreed upon with respect to the purported amendment of the OS Agenda and changes to the treatment of the contract extension. Given the nature of the public rights and violations at issue, we conclude that remediation is warranted for both violations.

#### **A. The Agendas Adequately Reflect the Board's Intention to Discuss the Contract Extension in Executive Session.**

The Petition asserts that the Board violated FOIA because the Agendas failed to reflect the Board's plan to hold a second executive session (after the conclusion of the initial open session) to discuss the proposed contract extension. We do not accept the factual premise of this argument and agree with the Board that the Agendas complied with FOIA.

This argument is premised on the dubious assumption that the Board intended to convene two executive sessions at the May 16<sup>th</sup> Meeting at the time the Agendas were published. We do not believe that was the case. The Board contends, and we believe, that, at the time the Agendas were published, the Board planned to convene a single hour-long executive session. In our view, the Board miscalculated the amount of time that would be necessary to discuss the items on the ES Agenda. As a consequence, the Board members were unable to conclude their discussions of

those matters within the allotted time-frame. At some point during the May 16<sup>th</sup> Meeting, the Board members agreed amongst themselves to reconvene in executive session to finish discussing the contract extension.

Based on the facts as we see them, we do not believe the Agendas violated FOIA's open meeting laws. FOIA requires our public bodies to give "public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof." 29 *Del. C.* § 10004(e)(2). FOIA requires that any such "notice" include an agenda notifying the public of important matters that will be discussed and possibly voted on so that members of the public can decide whether to attend a particular public meeting. *See* 29 *Del. C.* §§ 10002(a), 10004(e)(2); *Att'y Gen. Op.* 12-IIB09, at p. 4 (July 13, 2012). The Board timely posted the Announcement and the ES Agenda, which were sufficient to put the public on notice of the Board's intention to convene in executive session to discuss the contract extension. The OS Agenda was sufficient to put the public on notice that the Board would discuss and possibly vote on the contract extension at the May 16<sup>th</sup> Meeting. Nothing more was required.

FOIA does not require a public body to anticipate all matters that may arise after an agenda is filed. FOIA § 10004(e)(2) affords public bodies with flexibility to deal with unforeseen events and expressly permits them to amend an agenda to include "additional items," including executive sessions, that may arise during a public meeting. 29 *Del. C.* § 10004(e)(2) ("[T]he agenda shall be subject to change to include additional items including executive sessions or the deletion of items including executive sessions which arise at the time of the public body's meeting."). The Board had the discretion under FOIA § 10004(e)(2) to modify the OS Agenda to reflect the Plan and otherwise run the May 16<sup>th</sup> Meeting as it saw fit, except to the extent the conduct of the May 16<sup>th</sup> Meeting violated the letter or spirit of FOIA. We conclude



that the Board violated FOIA when it failed to communicate the Plan and related OS Agenda changes to the attendees.

**B. The Board's Vote to Approve the Contract Extension Violated FOIA and Was Invalid.**

As we recently observed, "FOIA contains a number of open meeting provisions that recognize and promote our citizens' rights to *observe* and *monitor* the performance of our public officials." *Att'y Gen. Op.* 12-IIB12, at p. 6 (Nov. 21, 2012) (emphasis original). We conclude that the Board violated FOIA by frustrating the public's right to observe and monitor the Board's discussion of and vote on a two-year contract extension for the District superintendent. The Board's failure to announce publicly the Plan or otherwise communicate the OS Agenda revisions misled attendees into believing that the contract extension would be addressed at a subsequent meeting. The Board's actions and omissions, whether intentional or not, caused attendees to leave the May 16<sup>th</sup> Meeting prior to the discussion of and vote on the contract extension.<sup>3</sup> The Board's vote to approve the contract extension was invalid.

We believe that remediation for this violation is warranted. We generally view the threat of invalidation as a serious sanction that ought not to be employed unless substantial public rights have been affected and the circumstances permit the crafting of remediation that protects

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<sup>3</sup> Based on the present record, we do not believe that the Board intentionally withheld information from attendees or otherwise willfully violated FOIA. Our prior written determination in *Att'y Gen. Op.* 10-IB12 (Sept. 28, 2010) states, without support, that FOIA violations of a similar nature require "evidence that the members knowingly avoid[ed] public monitoring of the deliberations." We do not believe that FOIA violations of the type involved in this case hinge on proof of *scienter*, though such evidence may be relevant in determining what remediation is necessary or appropriate in a particular situation.

other legitimate public interests. *See Ianni v. Dep't of Elections of New Castle County*, 1986 WL 9610, at \*p. 7 (Del. Ch. Aug. 29, 1986); *Att'y Gen. Op.* 02-IB17, 2002 WL 31031224, at \*p. 8 (Aug. 6, 2002). We first address the question of whether substantial public rights have been affected.

We believe that the Board's conduct in this case affected substantial public rights. In *Att'y Gen. Op.* 02-IB17, a similar case also involving this Board, we determined that the Board violated substantial public rights "by deciding who to hire as the new [District] superintendent outside of public view." *Id.* at \*8. The specific rights at issue in *Att'y Gen. Op.* 02-IB17 were the rights of students, parents, teachers, and other concerned citizens in the District to be involved in the selection of a new superintendent. *Id.* The present case involves an almost identical situation. We conclude that the Board's conduct in this case implicated and negatively affected substantial public rights. *See id.*; *see also Att'y Gen. Op.* 06-IB18, 2006 WL 2724978, at \*p. 5 (Sept. 5, 2006) ("The public has a right - enshrined in the open meeting law - to monitor and observe the process by which those officials who will govern them are selected. Citizens should have had clear notice before the Town filled the important [unelected] position of Vice Mayor.").

We next address whether invalidation of the Board's vote is appropriate under the circumstances presented here. We find *Att'y Gen. Op.* 02-IB17 instructive on this point. In that case, we determined that invalidation of the Board's vote to hire a new District superintendent was inappropriate, in part, because the school year was about to begin. *See id.* at \*8. We also noted that invalidation posed a significant risk of disruption to students, teachers and school administrators. *See id.* Finally, we found it relevant in that case that interested citizens had been provided with an opportunity to meet and evaluate the three finalists and were permitted to voice

their concerns with respect to the selection of a new superintendent. *See id.* The situation here is much different. The District has an acting superintendent and is in the middle of the school year. The risk of disruption in this case is substantially less. In addition, by virtue of the confusion created by the shifting OS Agenda, the public effectively had no ability to observe the process or voice concerns about the current superintendent or the proposed contract extension.

For these reasons, we conclude that invalidation is an appropriate remedy and recommend that the Board reschedule the contract extension for further discussion and vote at a subsequent public hearing.

**C. The Minutes Do Not Reflect What Actually Happened at the May 16<sup>th</sup> Hearing and Should Be Revised.**

The Petition asserts that the Board falsified the Minutes to make it appear as though the Board informed the public about the Plan during the initial open session. We cannot conclude, based on the current record, that the Board intentionally doctored the Minutes. We do agree, however, that the Minutes violate FOIA to the extent they purport to recount and constitute a record of events that never actually happened.

FOIA contains minimal reporting requirements for minutes and specifies that minutes need include only “a record of those members present and a record, by individual member[,] . . . of each vote taken and action agreed upon.” *Att’y Gen. Op.* 12-IIB01, at p. 6 (Jan. 6, 2012) (citing FOIA § 10004(f)). The Minutes do not satisfy these minimal requirements. The Minutes reflect that the Board voted on and unanimously approved the OS Agenda, as amended to reflect the Plan. We are quite confident those events did not happen in the manner in which they are portrayed in the Minutes. Indeed, the Board’s counsel has admitted that the Board did not

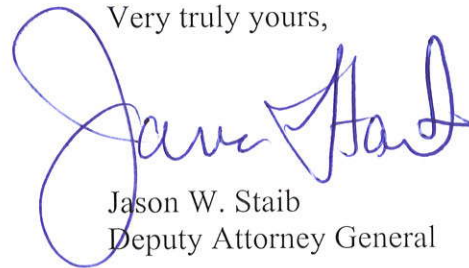
announce publicly that it would resume the executive session or thereafter return to open session for action on the proposed contract extension.

The Minutes do not reflect reality and should be revised to depict accurately the votes taken and actions agreed upon with respect to the OS Agenda.

#### IV. CONSLUSION

For the reasons discussed above, we conclude that (a) the Agendas are legally sufficient, (b) the Board violated FOIA by failing to disclose the Plan publicly and should take further action in respect of the contract extension at a subsequent public meeting and (c) the Minutes do not reflect what actually transpired at the May 16<sup>th</sup> Meeting and should be revised accordingly.

Very truly yours,



Jason W. Staib  
Deputy Attorney General

Approved:

/s/ Ian McConnel  
Ian R. McConnel,  
State Solicitor

cc: Ian R. McConnel, State Solicitor (via email)  
David H. Williams, Esquire (via email)